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Report of the International Law Commission on the work of its sixty-first session (2009)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, prepared by the Secretariat

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I. Introduction

1. At its sixty-fourth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 18 September 2009, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-first session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 15th to 23rd and 25th meetings, from 26 to 30 October and on 2, 3 and 12 November 2009. The Committee considered the item in four parts. The Chairman of the Commission at its sixty-first session introduced the report as follows: chapters I to IV and XIII (Part I) at the 15th meeting, on 26 October; chapters V and VI (Part II) at the 17th meeting, on 28 October; chapters VII and VIII (Part III) at the 18th meeting, on 28 October; and chapters IX, XI and XII (Part IV) at the 22nd meeting, on 2 November. At the 25th meeting, on 12 November, the Sixth Committee adopted draft resolution A/C.6/64/L.15, entitled "Report of the International Law Commission on the work of its sixty-first session". The draft resolution was adopted by the General Assembly at its 64th plenary meeting, on 16 December 2009, as resolution 64/114.

3. By paragraph 23 of its resolution 64/114, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixty-fourth session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary. It consists of 10 sections: A. Responsibility of international organizations;[1] B. Reservations to treaties; C. Expulsion of aliens; D. Protection of persons in the event of disasters; E. Shared natural resources; F. The obligation to extradite or prosecute (*aut dedere aut judicare*); G. Immunity of State officials from foreign criminal jurisdiction; H. Most-favoured-nation clause; I. Treaties over time; and J. Other decisions and conclusions of the Commission.

II. Topical summary

A. Responsibility of international organizations

4. For comments on draft articles adopted on first reading, see A/CN.4/620/Add.1.

B. Reservations to treaties

1. General comments

5. While some delegations stressed the need for the timely completion of the Guide to Practice, it was also stated that the Commission should strike a balance between a comprehensive approach to the topic and the need for a reasonable time frame for completion. A number of delegations were of the opinion that the possibility of simplifying or shortening the Guide to Practice should be explored. The elaboration of a separate document setting out the main principles underlying the Guide was also suggested.

[1] See A/CN.4/620/Add.1.

6. The point was made by some delegations that the Guide to Practice should not depart from the provisions of the Vienna Conventions, and it was also stressed that the various guidelines should be supported by sufficient practice. It was further suggested that a separate regime be developed for international organizations, which should not be addressed in the draft guidelines at this juncture.

7. Some delegations looked forward to the draft guidelines dealing with the effects of reservations, interpretative declarations and reactions thereto.

8. Appreciation was expressed for the memorandum by the Secretariat on reservations to treaties in the context of succession of States (A/CN.4/616). While some doubts were raised as to the appropriateness of addressing that issue in the Guide to Practice, the Special Rapporteur was invited to make further proposals thereon.

2. Interpretative declarations and reactions thereto

9. While a cautious approach was recommended with respect to interpretative declarations, some delegations welcomed their inclusion in the Guide to Practice; it was also suggested that further clarification be sought regarding the legal effects of interpretative declarations. According to a different view, the Guide to Practice should not address interpretative declarations. It was further stated that detailed provisions on interpretative declarations might undermine their role and create practical problems.

10. Some delegations expressed support for the recommendations set out in draft guidelines 2.4.0 and 2.4.3 bis on the form and communication of interpretative declarations, although it was also suggested that the wording of these provisions be strengthened. According to a different view, it was questionable to subject the formulation of interpretative declarations to requirements similar to those applicable to reservations.

11. Attention was drawn to the need for further study on the legal nature of conditional interpretative declarations and their legal effects. While some delegations warned against subjecting conditional interpretative declarations to the same legal regime as reservations, other delegations were of the opinion that such declarations should be treated as reservations. The reconsideration of whether the notion of conditional interpretative declaration should be retained at all was also proposed.

12. Concerning reactions to interpretative declarations, further clarification was sought, in the commentary to draft guideline 2.9.1, of the term "approval". Some delegations also required further clarification regarding the exceptional cases and relevant circumstances in which, according to draft guideline 2.9.8, approval of, or opposition to, an interpretative declaration could be inferred from conduct.

13. While support was expressed for the current formulation of draft guideline 2.9.9, dealing with silence in respect of interpretative declarations, some delegations sought further elaboration on the relevance of silence in determining whether an interpretative declaration had been approved. The opinion was also expressed that it was not appropriate to presume, as suggested in that guideline, that in normal circumstances silence in respect of an interpretative declaration did not produce any legal effect. The view was also expressed that, while silence in respect of an interpretative declaration could in some cases be construed as acceptance,

objections and recharacterizations should always be expressed and formulated in writing.

14. Some delegations deemed essential further study on the legal effects and practical aspects of recharacterizations of interpretative declarations and possible reactions to such recharacterizations.

15. Support was expressed for draft guideline 2.9.10, subjecting reactions to conditional interpretative declarations to the same guidelines as those governing reactions to reservations. However, the utility of the guideline was also questioned.

3. Reservations to the constituent instrument of an international organization

16. Support was expressed for the position, reflected in draft guidelines 2.8.7 and 2.8.8, that reservations to the constituent instrument of an international organization required the acceptance of the competent organ of the organization, unless otherwise provided in the constituent instrument. However, doubts were raised as to whether these guidelines added value to article 20, paragraph 3, of the Vienna Convention on the Law of Treaties of 1969, and it was also questioned whether draft guideline 2.8.8, containing alternative definitions of such competent organ, was sufficiently comprehensive. Furthermore, the solution retained in draft guideline 2.8.10, whereby a reservation made prior to the entry into force of the constituent instrument was considered to have been accepted if no signatory State or signatory international organization had raised an objection to it by the end of a period of 12 months after they were notified of the reservation, was criticized as having the potential to lead to undesirable results; it was proposed, instead, that the effects of such a reservation remain undetermined until the competent organ of the organization was actually constituted.

4. Permissibility of reservations, interpretative declarations, and reactions thereto

17. A concern was expressed regarding the lack of clarity of the term "permissibility", which could refer to compliance with the formal procedures for formulating reservations and objections, to the fulfilment of the substantive requirements for validity of reservations and objections, or to the capacity of reservations, interpretative declarations or reactions thereto, to produce legal effects.

18. Some delegations pointed to the need for further study on the legal effects of the impermissibility of a reservation, including with respect to reservations to human rights treaties. It was suggested by some delegations that the legal effects of an impermissible reservation might depend on whether or not the reservation had been accepted by the contracting parties, or on whether an objecting party had decided to remain in a treaty relationship with the author of the impermissible reservation. According to a different view, the legal regime of acceptances of or objections to reservations, established by articles 20 and 21 of the Vienna Convention of 1969, was applicable only to permissible reservations; thus, the Commission was invited to clarify that silence in respect of an impermissible reservation could not be regarded as acceptance of that reservation.

19. Support was expressed for the view, reflected in guideline 3.3, that the Vienna Conventions did not justify any distinctions between the consequences of the different grounds for impermissibility. Some delegations also indicated their agreement with the proposition, contained in draft guideline 3.3.1, that the

formulation of an impermissible reservation did not, in itself, engage the international responsibility of the author of the reservation.

20. With respect to the permissibility of objections to reservations, it was stated that objections must not undermine the object and purpose of the treaty or be incompatible with a peremptory norm of general international law. According to a different view, there was little merit in subjecting objections to conditions for permissibility, as the real problem lay in the effects of reservations and objections. While some delegations supported the conditions set forth in guideline 3.4.2 for the permissibility of "objections with intermediate effect", i.e., objections purporting to exclude the application of provisions of the treaty to which the reservation did not relate, some other delegations were of the opinion that the notion of "sufficient link" between the provisions that the objection purported to exclude and the provision in respect of which the reservation was formulated required further clarification. Some delegations questioned the permissibility of such objections, which were viewed as seriously undermining the stability of treaty relations and possibly frustrating the object and purpose of the treaty. It was also suggested that the consent, albeit tacit, of the author of the reservation might be necessary for an objection with "intermediate effect" to produce its purported effects. Furthermore, the view was expressed that the intended effects of such objections could be considered equivalent to those of reservations.

21. Concerning the permissibility of interpretative declarations, the view was expressed that issues relating to the permissibility of interpretative declarations and reactions thereto arose only in situations where an interpretative declaration was prohibited by the treaty. While support was expressed, in this regard, for draft guideline 3.5, the Commission was invited to provide examples of treaties containing implicit prohibitions of interpretative declarations. According to a different view, the only conditions for the permissibility of interpretative declarations and reactions thereto were the requirements that such declarations and reactions must not frustrate the object and purpose of the treaty or contravene *jus cogens*. It was suggested that draft guideline 3.5 enunciate the requirement that interpretative declarations be compatible with the object and purpose of the treaty. According to another proposal, no reference should be made to the compatibility of an interpretative declaration with "a peremptory norm of general international law", given the divergences of opinions as to the scope of such norms and who should determine it.

5. Assessment of the permissibility of reservations

22. Attention was drawn to the risk of divergent assessments, by the various entities listed in draft guideline 3.2, of the permissibility of a reservation, and to the different legal effects that could be attached to such assessments.

23. While it was indicated that the draft guidelines on the assessment of the permissibility of reservations by treaty monitoring bodies filled an existing gap in the 1969 Vienna Convention, doubts were raised as to the appropriateness of addressing, in the Guide to Practice, recommendations to States regarding the competences of treaty monitoring bodies.

24. The competence of treaty monitoring bodies to assess the permissibility of reservations was favoured by some delegations and questioned by some other delegations. While it was stated that allowing treaty monitoring bodies to assess the

permissibility of reservations could ensure legal certainty and minimize the risk of controversy, concerns were also raised about equating the positions adopted by treaty monitoring bodies to those adopted by contracting States and international organizations. It was further stated that the assessment of the permissibility of reservations by contracting parties should have priority over the assessment by treaty bodies or dispute settlement bodies and that, should a reservation be regarded as impermissible, its author ought to be given the option of withdrawing it or denouncing the treaty.

25. Some delegations indicated that the competences of treaty monitoring bodies, including with respect to the assessment of the permissibility of reservations, were determined by the relevant treaty, or by specific agreement between the parties. It was also stated that the assessment of the permissibility of reservations should remain the prerogative of contracting parties, that treaty monitoring bodies should have no powers except those assigned to them by the treaty and that disputes concerning the permissibility of reservations should be resolved only through dispute settlement mechanisms provided for either in the treaty or in a special agreement between the contracting parties.

26. While support was expressed for the formulation of draft guideline 3.2.1, regarding in particular the legal effect of any conclusion by a treaty monitoring body as to the permissibility of a reservation, further clarification was also sought on that point. The view was expressed that the legal effect of an assessment by a treaty monitoring body of the permissibility of a reservation should be determined by reference to the function entrusted to that body by the treaty, and that the absence of any specific reference in treaty provisions to the competence of a treaty monitoring body to assess the permissibility of reservations should not, under any circumstances, be interpreted as permitting a legally binding role in that respect.

C. Expulsion of aliens

1. General comments

27. Some delegations acknowledged the complexity of the topic and raised doubts as to its suitability for codification. Attention was also drawn to the difficulty of establishing customary rules on the subject. While some delegations emphasized the need for the Commission to base its work on relevant State practice, the view was expressed that some of the proposed draft articles were too general or were not supported by sufficient practice in terms of customary law.

28. While the hope was expressed that the Commission would make further progress on the topic during its sixty-second session, it was also suggested that discussions take place within the Commission concerning the direction to be taken in considering the topic, including the structure of the draft articles that were being elaborated, as well as the possible outcome of the Commission's work.

29. Indeed, some delegations sought a clearer delimitation of the scope of the topic, regarding, in particular, the various situations and measures to be covered. The view was expressed that issues such as denial of admission, extradition, other transfers for law enforcement purposes and expulsions in situations of armed conflict should be excluded from the scope of the draft articles. Attention was also drawn to the distinction between the right of a State to expel aliens and the

implementation of an expulsion decision through deportation. The need to distinguish between the situation of legal and illegal aliens was also underlined.

2. Non-expulsion of nationals

30. The view was expressed that the prohibition of the expulsion of nationals also covered individuals having acquired one or several other nationalities.

3. The protection of the rights of persons being expelled

31. Delegations welcomed the emphasis on human rights protection in the Commission's consideration of the topic. Some delegations pointed to the need to reconcile the right of States to expel aliens with the respect for the rights of persons being expelled, also taking into account the situation in the State of destination. While a preference was expressed for a comprehensive approach that would not be limited to a list of specific rights, according to another view the Commission's analysis should be limited to those rights that were specifically relevant in the event of expulsion, including the role of assurances given by the State of destination concerning respect for those rights.

32. Some other delegations expressed concern regarding the elaboration of a list of human rights to be respected in situations of expulsion, particularly in the light of the fact that all human rights must be respected and that it was not feasible to enumerate all of them in the draft articles. The inclusion of a provision stating the general obligation of the expelling State to respect the human rights of persons being expelled was thus favoured by several delegations. Furthermore, a number of delegations cautioned against differentiating, in relation to expulsion, between different categories of human rights, in particular by characterizing some of them as being "fundamental" or "inviolable".

33. It was further suggested that the Commission rely on settled principles reflected in widely ratified instruments, as opposed to concepts or solutions derived from regional jurisprudence.

34. Some delegations mentioned a number of specific human rights guarantees to be afforded to persons being expelled, such as the right to life, the prohibition against expelling an individual to a State in which there was a risk that he or she would be subjected to torture or other cruel, inhuman or degrading treatment or punishment; and the right to family life. Attention was also drawn to the property rights of aliens being expelled, in particular in connection with the confiscation of their property, as well as to the right to compensation for unlawful expulsion. Furthermore, reference was made by some delegations to the need to address the procedural rights of persons affected by expulsion, such as the right to contest the legality of an expulsion, the right to be heard and the right to the assistance of counsel.

35. Opposing views were expressed as to whether respect for the right to life entailed the obligation for a State, before expelling an individual, to obtain sufficient guarantees as to the non-imposition of the death penalty against that individual in the State of destination. The view was also expressed that States should not be placed in the situation of being responsible for anticipating the conduct of third parties which they could neither foresee nor control.

36. While the view was expressed that human dignity was the foundation of human rights in general, and while further elaboration on that concept was suggested, some delegations expressed the view that the meaning and the legal implications of the right to dignity were unclear.

37. A view was expressed supporting the inclusion of a provision on the protection of vulnerable persons, such as children, the elderly, persons with disabilities and pregnant women. It was further suggested that the principle of the best interest of the child be reaffirmed in the context of expulsion.

38. The point was made that the treatment to be given to the principle of non-discrimination in the context of expulsion was unclear. The view was expressed that the principle of non-discrimination applied only in relation to the expulsion proceedings and was without prejudice to the discretion of States in controlling admission to their territories and in establishing grounds for the expulsion of aliens under immigration law. Doubts were also raised by some delegations as to the existence, in the context of expulsion, of an absolute prohibition of discrimination based on nationality.

4. Grounds for expulsion

39. The view was expressed that a State had a sovereign right to expel aliens if they had committed a crime or an administrative offence, if their actions had violated its immigration laws or threatened its national security or public order, or if the expulsion was necessary for the protection of the life, health, rights or legitimate interests of its nationals. The point was also made that expulsion must serve a legitimate purpose and satisfy the criterion of proportionality between the interests of the expelling State and those of the individual being expelled.

D. Protection of persons in the event of disasters

1. General comments

40. Several delegations expressed their satisfaction with the efforts of the Special Rapporteur to liaise with representatives of international governmental and non-governmental organizations involved in dealing with disasters. It was further observed that it was important to avoid any duplication of the work undertaken by the International Federation of Red Cross and Red Crescent Societies.

41. It was suggested that the Commission analyse national legislation, international agreements and the practice of States and non-State actors in order to identify the main legal and practical issues involved, with a view to filling gaps in the existing legal framework, in particular as it relates to the implementation of existing international strategies for disaster risk reduction.

2. Scope of the draft articles

42. Agreement was expressed with the approach of the Commission that article 1 should be separated into two provisions, as proposed by the Special Rapporteur: one on scope *stricto sensu* and the other on the purpose of the legal regime to be created.

43. With regard to the scope of the topic *ratione materiae*, delegations were generally of the view that a strict distinction between natural and man-made

disasters was not necessary; such a distinction could be artificial and difficult to make in practice in view of the complex interaction of different causes leading to disasters. From another perspective, it was preferable to limit the scope of the topic to natural disasters that caused loss of life, property damage or environmental degradation. It was also suggested that the draft articles should cover disasters with a transboundary effect as well as those without such an effect.

44. As to the scope *ratione personae*, support was expressed for limiting the subject of the study to the rights and obligations of States. The view was also expressed that the Commission should focus on the rights and duties of the State in respect of its own people, third States and international organizations in a position to cooperate in the provision of relief, and postpone consideration of the role of non-State actors to a later stage.

45. Several delegations supported limiting the scope *ratione temporis* of the topic to the disaster response and post-disaster reconstruction phases. The question of whether to address pre-disaster prevention could be decided at a later stage. From another perspective, the expression "in all phases of a disaster", contained in the Special Rapporteur's proposal for draft article 1, was important, since it would allow the Commission to address disaster prevention.

3. Purpose

46. As regards the purpose of the draft articles, as outlined in draft article 2, provisionally adopted by the Drafting Committee in 2009, support was expressed for the view that the rights-based approach, combined with the needs-based approach, was appropriate for providing relief for individuals who suffered as a result of disasters. It was suggested that, in taking a rights-based approach, all rights — civil and political, as well as economic and social, including those relevant to vulnerable groups of persons, such as refugees, persons with disabilities and minorities — should be taken into consideration. From another perspective, the Commission was wise not to focus on particular categories of rights but to refer to human rights in general.

47. Some other delegations expressed a preference for a needs-based approach, which focused on avoiding undesirable consequences such as delays in the provision of assistance.

48. Furthermore, doubt was expressed as to the viability of rights- or needs-based approaches to the topic, on the basis that both approaches were ambiguous, as the elements included in the concepts of rights or needs were not clearly defined. Nor did the concepts properly address individual, collective and public-order interests in an integrated manner. Such approaches also implied that individuals were in a position to appeal for international disaster relief. It was suggested that, instead, the focus be placed on making progress on the technical task of building a legal framework to underpin and facilitate disaster relief.

49. As for terminology, it was suggested that the words "adequate and effective" be replaced by "timely and effective". From another perspective, it did not seem unreasonable to state that the response envisaged must be not only adequate but also effective.

4. Definition of disaster

50. The Commission was encouraged to take into account existing definitions, in particular that contained in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998. Some other delegations were of the view that a definition of "disaster" based on the Tampere Convention might not be the best model, owing to the specific scope of that Convention.

51. The view was expressed that the element of disruption of the functioning of society might not be appropriate, since it might lead to the exclusion of cases where relief measures were taken in accordance with well-prepared emergency plans. Suggestions for reformulation included the phrases "situation of great distress" and "a sudden event".

52. Support was expressed by some delegations for the inclusion of not only human loss, but also material and environmental losses, as well as for the inclusion of an element of causation. The view was also expressed that the definition adopted by the Drafting Committee was balanced and acceptable, since it recognized that a disaster could involve either a single event or a complex series of events, and it stressed the consequences rather than the causes of a disaster. It was recalled that the Tampere Convention did not include the element of causality, since the causes of disasters were sometimes complex and it was difficult to distinguish between environmental and human factors. It was further suggested that the definition should include the element of exceeding the State's response capacity in order for an event to be considered a disaster.

5. Relationship with international humanitarian law

53. Several delegations expressed support for the exclusion of situations of armed conflict from the scope of the draft articles by means of a reference to the rules of international humanitarian law. It was suggested that such an approach would avoid the difficulty of differentiating between armed conflicts and other types of disasters, while also safeguarding the integrity of those rules as *lex specialis* applicable in situations of armed conflict.

54. The view was also expressed that the draft articles should deal with those aspects of disasters that occur during or as a result of armed conflict which are not covered by existing rules of international humanitarian law. Accordingly, support was expressed for the inclusion of a "without prejudice" provision preserving the applicability of the rules.

6. Duty to cooperate

55. Support was expressed for the centrality to the topic of the principles of solidarity and cooperation. Nonetheless, several delegations reiterated the fact that the affected State retained the primary responsibility for the protection of persons on its territory or subject to its jurisdiction during a disaster, while effective international cooperation among nations, international organizations, civil society and individuals, although essential, played a subsidiary role.

56. The view was also expressed that, notwithstanding the primary responsibility of the affected State, if, following the onset of a disaster, that State was unable to protect individuals under its jurisdiction, it had a duty to cooperate with other States

and organizations able and willing to provide the required assistance. International organizations and entities such as the United Nations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross were important partners in such cooperation. It was clarified, however, that a right to humanitarian assistance did not imply a right to impose assistance on a State that did not want it. It was suggested that consideration be given to the factors that would trigger the duty to cooperate on the part of States. It was also suggested that a distinction be made between the duty to cooperate with the United Nations and the duty to cooperate with other organizations.

57. Reference was further made to several other core principles of international law, such as humanity, neutrality, impartiality, sovereignty and non-intervention, which were also relevant and needed to be addressed in the context of the topic. Generally, delegations supported the Commission's conclusion that the concept of "responsibility to protect" did not apply to disaster respon- .

58. In terms of drafting suggestions, it was proposed that the term "civil society" be replaced by "non-State actors" or "non-governmental organizations". It was suggested that an explicit reference to the International Committee of the Red Cross also be included.

7. Form of the draft articles

59. It was suggested that the work of the Commission could eventually result in the adoption of a convention outlining the rights and obligations of States, which could serve as a point of reference for the elaboration of bilateral or regional agreements. The view was also expressed that the development of non-binding guidelines or a framework of principles for States and others engaged in disaster relief was likely to be of more practical value and enjoy more widespread support.

E. Shared natural resources

1. General comments

60. The present section addresses only comments and observations made by delegations in relation to the oil and gas aspects of the topic.[2] It may be noted, nevertheless, that some delegations welcomed the Commission's decision to address the issue of aquifers separately from the oil and gas aspects, noting in particular that there were fundamental differences between water resources and oil and gas resources, which therefore posed different management challenges and impacted States in different ways.

2. Comments on the oil and gas aspects of the topic

61. A variety of views were expressed with regard to whether the Commission should address the oil and gas aspects of the topic. Some delegations emphasized that the subject matter involved highly technical data and politically sensitive issues, with implications for the sovereignty of States. Moreover, the subject matter

[2] For comments and observations of delegations on the draft articles on the law of transboundary aquifers, adopted on second reading by the Commission at its sixtieth session, see A/C.6/64/SR.17-19, 21 and 22.

was highly technical, specific resource conditions varied widely and State practice in the area was divergent, essentially bilateral and relatively sparse. Accordingly, a more cautious approach was advocated, as it was noted that it would be difficult and premature to consider the topic and that there was no urgent need to place the subject on the Commission's agenda. In the same vein, some delegations were not persuaded that further codification work by the Commission would have added value. On the contrary, such an effort might inadvertently lead to more complexity and confusion in an area in which fully functional working bilateral relationships were relied upon. It was also noted that it would not be productive for the Commission to try to extrapolate customary international law, common principles or best practices from the divergent and sparse State practice in this area. Moreover, the interface between inter-State treaties and commercial agreements between corporations related to transboundary field exploitation made it more productive for the Commission to note the existence of such practice, rather than attempt to engage in a process of codification or otherwise further explore these complicated issues.

62. This line of thinking was buttressed with the observation that the specific and complex issues related to oil and reserves had for many years been adequately addressed in bilateral relations and did not seem to pose insurmountable problems in practice, since a plethora of bilateral agreements and other arrangements already provided legal certainty in the area, and that there was no compelling need for global regulation or universal rules. Indeed, concern was expressed that any attempt at generalization might be counterproductive to the resolution of real or potential disputes. It was also noted that the subject matter concerned fundamental bilateral interests of States; the particular States involved were therefore best able to negotiate agreements which reflected their interests and should thus continue to have the flexibility to create cooperative frameworks bilaterally, on a case-by-case basis. Experience in negotiating agreements in this area showed that, while States should be encouraged to cooperate with each other, the content of such arrangements and the solutions reached were largely the result of practical considerations based on technical information, which were bound to differ in accordance with the specificities of each case.

63. Other delegations stressed that issues concerning transboundary oil and gas resources ought not to be taken lightly, in particular given the fact that energy demands were continuously on the rise and that such demands would double by 2030. While the scarcity of and the growing demand for energy required that sufficient rules be established to avoid transboundary conflict, there was also a recognition that, by and large, there should be room for dealing with such matters bilaterally on the basis of international law and cooperation, bearing in mind that the issues were also complicated by prevailing private and commercial interests. Accordingly, a middle course of action was suggested, whereby the Commission would survey the practice of both inter-State and private contracts with a view to elucidating some general trends in practice, both in public and private law, including through the elaboration of guidelines, if necessary.

64. A related view was expressed suggesting that, while there may be no need for the development of universal rules in the area, the Commission could elaborate elements or common principles and best practices which would be useful for States when negotiating bilateral agreements, and it could also summarize State practice. Such practice could include various agreements and arrangements between the States concerned and between their national oil and gas companies.

65. Those in support of the consideration by the Commission of the oil and gas aspects pointed to the ever-growing demand worldwide for natural resources, noting that any codification efforts would contribute to the maintenance of international peace and security, as well as the optimal use of such resources for the benefit of humankind. The complexity of the subject was acknowledged and its great relevance in the modern world was stressed. The high potential of an agreed set of rules in preventing conflict, the economic and political importance of the resource and the environmental considerations that the subject evoked were noted in particular. Such an exercise would also contribute to the establishment of an equitable and sustainable legal regime for States when sharing such precious and exhaustible resources. It was also noted that the Commission's work would be of practical significance for petroleum-producing States and would have an influence on the system of joint oil exploitation in use between States with such transboundary resources. The elaboration of general principles applicable to the exploitation of such resources and the basic rights and obligations of the States which shared them, without prejudice to bilateral solutions which States might wish to establish, would also fill existing gaps in the law.

66. It was also recalled that the consideration of oil and gas was contemplated in the step-by-step approach suggested by the Special Rapporteur, as well as in the syllabus on the topic prepared in 2000. Moreover, from the legal and geological perspectives, there were similarities between groundwaters and oil and gas, and any study of the subject would be predominantly technical, requiring a multidisciplinary approach and assistance from relevant international organizations, as well as scientific, technical, commercial and legal experts.

67. Other delegations supported the resumed consideration of the topic to address the oil and gas aspects, if the majority of States so desired. In this connection, the recommendation to recirculate the questionnaire on State practice and to defer a decision until 2010 was considered prudent.

68. Some delegations were non-committal, either limiting themselves to noting that the subject matter required a more in-depth examination, given that oil and gas were natural resources that were frequently shared, while also expressing their interest in following the work of the Commission and providing support in the context of a future examination of the subject; or reserving judgement on the outcome and looking forward to the study to be prepared in the context of the Working Group on shared natural resources, while nevertheless expressing doubts as to whether the topic was ripe for codification.

69. On the substance, were the Commission to proceed with the consideration of oil and gas resources, some delegations cautioned against addressing questions concerning maritime delimitation, which were better dealt with in accordance with the United Nations Convention on the Law of the Sea by the States concerned and/or by competent judicial bodies, including the International Court of Justice, or existing bilateral mechanisms. It was also considered necessary to distinguish between provisional instruments regulating the joint development of oil and gas resources in a disputed area pending final delimitation of the boundary in the disputed area and instruments that dealt with resources straddling an established boundary between States. The point was also made that discussion of the subject should take into account the principle of permanent sovereignty over natural resources, as set out in General Assembly resolution 1803 (XVII) of 14 December

1962, as well as the principle of cooperation, on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith. Other principles mentioned as relevant to the subject included the precautionary principle, equitable and reasonable utilization and *sic utere tuo ut alienum non laedas*.

F. The obligation to extradite or prosecute (*aut dedere aut judicare*)

1. General comments

70. While welcoming the Commission's work on the topic, some delegations expressed their regret with regard to the slow progress, noting that the purpose and scope remained to be clarified.

71. Several delegations expressed their appreciation for the general framework elaborated by the open-ended Working Group. Some delegations were of the view that the Commission should start its consideration of the topic with a systematic review of relevant international treaty provisions, domestic legislation and judicial decisions.

2. Legal bases of the obligation

72. Some delegations noted that the source of the obligation to extradite or prosecute was to be found in treaty law. While some delegations were of the view that its customary status was not granted or was debatable, others believed that it may have reached such a status, at least with respect to serious international crimes, such as genocide, crimes against humanity, war crimes and terrorism. It was argued that the legal basis of the obligation with regard to certain crimes, such as piracy, was unclear. The Commission was encouraged to continue its examination of the legal bases of the obligation.

3. Material scope and content of the obligation

73. Some delegations explained that they would welcome a determination by the Commission of the categories of crimes for which the obligation would apply. While some delegations argued that the obligation was limited to international crimes, others noted that certain treaties extended it to crimes of a lesser gravity. It was suggested that the Commission define the obligation and examine the relationship between its two constitutive elements.

4. Relationship with other principles

74. It was pointed out that the obligation to extradite or prosecute and the principle of universal jurisdiction were different. While some delegations encouraged the Commission to explore their mutual relationship, others expressed the belief that making such a link was largely unjustified. It was emphasized that the Commission's work should not prejudge the consideration by the Sixth Committee of the item entitled "The scope and application of the principle of universal jurisdiction".

75. It was further observed that the obligation to extradite or prosecute must be exercised by respecting other principles of international criminal law, in particular *nullum crimen sine lege*, *nulla poena sine lege* and *non bis in idem*.

5. Conditions for the triggering of the obligation and implementation

76. Some delegations welcomed further examination of the conditions for the triggering of the obligation. The attention of the Commission was drawn, in particular, to the conditions of extradition and prosecution. The Commission was also encouraged to consider other relevant issues, such as those relating to the exercise of jurisdiction, the limitations and guarantees during extradition proceedings, international cooperation and so forth.

6. Surrender of suspects to international criminal tribunals

77. While some delegations favoured consideration by the Commission of the surrender of suspects to international criminal tribunals, others discouraged it from examining the issue.

7. Possible outcome of the Commission's work

78. While some delegations encouraged the Commission to continue with the elaboration of draft articles, others considered that draft articles on the topic would not be appropriate, given that the obligation exists only in treaty law. It was also suggested that the Commission's work might take the final form of guidelines containing generally agreed interpretations of controversial issues.

G. Immunity of State officials from foreign criminal jurisdiction

79. Some delegations underlined the importance of this topic and expressed their regret that the Commission was not able to continue its consideration at its 2009 session. Accordingly, the Commission was urged to give priority to the topic at its future sessions.

H. Most-favoured-nation clause

1. General comments

80. Several delegations welcomed the work of the Study Group on the most-favoured-nation clause and took note of the progress made by the Commission at its sixty-first session, with some expressing support for the road map for future work, noting that in general it struck an appropriate balance by bringing greater understanding to the area without prejudicing the work previously done by the Commission and developments in other forums, and underscoring the need to avoid replicating work already done by other bodies. Although questions were raised with regard to some studies to be carried out and how broad such studies should be, some delegations evinced a willingness to provide information relevant to some of the studies.

81. Some delegations highlighted the relevance of the topic, noting that with the inclusion of the most-favoured-nation clause in numerous bilateral, regional and multilateral investment-related treaties, most-favoured-nation treatment had become a central tenet of international investment and trade policy. It was also noted that the most-favoured-nation clause had particular relevance for developing countries striving to attract foreign investment. It was therefore crucial that in the

consideration of the topic sight not be lost of the broad application of the most-favoured-nation clause and its effect on development.

82. Although appreciation was expressed for the important work accomplished by the Commission in its earlier consideration of the topic, it was acknowledged that some significant developments had taken place since then, resulting in a substantial new body of practice and necessitating a re-examination of the topic. In this connection, some delegations looked forward to an approach that would seek to clarify the scope of most-favoured-nation clauses and to evaluate the extent to which the 1978 draft articles adopted by the Commission remained applicable.

83. Some delegations continued to express doubts as to whether the interpretation of most-favoured-nation clauses was ultimately an area of law that was suitable for codification, noting in particular that the interpretation of such clauses by tribunals had been heavily dependent on the particular wording of the clause in question. It was nevertheless stressed that most-favoured-nation provisions were principally a product of treaty formation and tended to differ considerably in their structure, scope and language; they were also dependent on other provisions in the specific agreements in which they were included, and, as a consequence, resisted easy categorization or study. Accordingly, those considerations needed to be taken into account by the Study Group.

2. Methodology

84. Some delegations addressed questions of methodology, questioning the legal value of the studies as envisaged, as well as the efficacy of departing from the traditional working methods of the Commission, and pointing out, in particular, that while the work to be carried out was very likely to be valuable from an academic viewpoint, a final and definitive opinion would be reserved as to whether the approaches taken were consistent with the functions of the Commission. Moreover, concern was expressed about what was perceived to be a heavy workload facing the Commission in the immediate future, and the Commission was urged to focus attention on those topics concerning which it could make an effective contribution in the codification and progressive development of international law.

3. Possible outcome of the Commission's work

85. The importance of bringing a practical dimension to the final outcome of the exercise was also stressed. Some delegations expressed the hope that the work would culminate in the drafting of broad guidelines, which would bring greater coherence and consistency to the operation of the most-favoured-nation clause and be of benefit to States and arbitral tribunals, or broad principles, based on the research undertaken. It was noted that a comprehensive study on the topic could be of use to treaty specialists and legal advisers. However, the point was also made that the Commission might eventually consider elaborating draft articles, building on and updating the 1978 draft articles so as to reformulate them to correspond to contemporary circumstances. At the same time, the view was expressed that the exercise did not lend itself to the elaboration of draft articles.

I. Treaties over time

1. General comments

86. Several delegations welcomed the inclusion of the topic in the Commission's current programme of work, and support was also expressed for the Study Group established on the topic. It was suggested that the Commission not only conduct a study on the topic, but also provide useful and practical results for States. The hope was expressed that the Commission's consideration of the topic could be completed in an expeditious manner, namely, within the next five years.

87. It was observed that the rules on treaty interpretation, as set out in the Vienna Convention on the Law of Treaties of 1969, were well established and that the Commission should avoid introducing uncertainty into that area. While the need to preserve the principles of stability and continuity in treaty relations was emphasized, the view was expressed that the Commission would have to strike a balance between the *pacta sunt servanda* principle and the need to interpret and apply treaty provisions in context. The view was also expressed that the Commission should not seek to develop the law outside the scope of the Vienna Convention, nor reduce the flexibility allowed by it.

2. Scope of the topic and issues to be examined

88. Some delegations were of the view that the Commission should, at least for the time being, take the narrower approach to the topic focusing on the issue of subsequent agreement and practice, rather than the broader approach taking account of all the possible factors that might affect the operation of a treaty over time. At the same time, it was suggested that the issue of subsequent agreement and practice should not be studied solely from the perspective of treaty interpretation. According to a different view, the scope of the topic should, at this stage, be kept as broad as possible, and members of the Study Group should be encouraged to make contributions on other issues related to the topic.

89. Some delegations looked forward to the report on subsequent agreement and practice as addressed in the jurisprudence of the International Court of Justice and other international courts and tribunals, to be submitted by the Chairman of the Study Group at the sixty-second session of the Commission. However, it was suggested that the Study Group begin its work by also looking at the jurisprudence of national courts that had considered the role of subsequent agreement and practice in treaty interpretation.

90. It was proposed that the Commission examine, under this topic, the relationship between treaty law and customary law, including questions such as supervening custom, obsolescence and the emergence of peremptory norms of international law. It was further suggested that the issue of the obsolete provisions of Articles 53, 77 and 107 of the Charter of the United Nations (the "former enemies clauses") also be addressed.

3. Possible outcome of the Commission's work

91. Some delegations favoured the idea of elaborating a repertory of practice, possibly accompanied by commentaries, so as to provide practical guidance to States. Support was also expressed for the elaboration of draft guidelines.

J. Other decisions and conclusions of the Commission

92. Delegations appreciated the Commission's fundamental task in promoting the progressive development of international law and its codification, while also underscoring the deliberative role played by States. Recognizing that the Commission relies on doctrinal material, jurisprudence and evidence of State practice in its work, some delegations underlined the importance of the responses and contributions of States, international organizations and other relevant institutions in supporting the work of the Commission.

93. It was stressed that the interaction between the Commission and States, whereby the Commission requests information and comments from States, in particular through questionnaires, as well as the debate and interactive dialogue in the Sixth Committee, was critical to the success of its efforts in the progressive development of international law and its codification. In this connection, it was suggested that there was need to enhance further the interaction between the Commission and the Sixth Committee in the context of the revitalization of the work of the Sixth Committee, and that questionnaires should be more user-friendly, focusing on the main aspects of the topic under consideration.

94. Furthermore, it was suggested that contacts and consultations between representatives of States and Special Rapporteurs during the meetings of the Sixth Committee be strengthened. Moreover, some delegations expressed regret that financial constraints prevented Special Rapporteurs from being present when the parts of the Commission's report pertaining to their topics were being considered in the Sixth Committee. Making available to Commission members, in particular to the Special Rapporteurs, statements made by delegations in the Sixth Committee was considered an important aspect of improving the dialogue. On the other hand, the observation was made that, given the financial constraints, Special Rapporteurs should in turn provide detailed explanations in their reports on the position taken vis-à-vis comments and/or proposals submitted by States.

95. Several delegations acknowledged the crucial role played by Special Rapporteurs in the work of the Commission, recognizing their tireless efforts both in session and intersessionally. In this connection, support was registered for the reconsideration of honorariums and other assistance to Special Rapporteurs. Accordingly, support was expressed for any measures aimed at increasing funding for the work of the Commission and the Office of Legal Affairs, preferably from the regular budget.

96. Some delegations also expressed their appreciation for the practice whereby they received in advance chapters II and III of the report of the Commission, while stressing the importance of their receiving the report as a whole well in advance of its consideration in the Sixth Committee, which would facilitate a more thorough and comprehensive discussion.

97. Some delegations expressed concern that the report of the Commission for 2009 did not seem to reflect progress comparable to that made in previous years. The view was also expressed that the apparent lack of progress on some topics could be attributed to the absence of technical and financial assistance for Special Rapporteurs, information from Governments insufficient to allow Special Rapporteurs to complete their task, and a perception of passiveness on the part of

the Commission with regard to the reiteration of requests for information and comments from States.

98. Some delegations commented on the working methods of the Commission, suggesting that the Commission should, at each session, concentrate on one or two topics, instead of making slow progress on all topics on its agenda, noting that a more pragmatic approach could lead to a less overburdened agenda. The Commission was also encouraged to set deadlines for the completion of its work on particular topics, as this would contribute to their conclusion in a timely manner.

99. The suggestion was made that the Commission focus on whether the existing working methods were suitable for contemporary legal debate, noting that the role and function of the Special Rapporteur may require reconsideration, with more recourse to study groups, as appropriate, since they seemed to have the potential to facilitate the better distribution of work and offer the possibility of an early result. On the other hand, reservations were expressed regarding the recent tendency towards the proliferation of study groups, noting that the Commission's main task was, and should remain, elaborating draft articles, rather than conducting mere studies.

100. Comments were also made on the outcome of the work of the Commission, noting that as the Commission explores new topics, it should be encouraged to be more flexible on the final form of its work. Its outcomes need not in all cases lead to a codifying treaty text. Some topics presented themselves as being unsuitable for codification or progressive development in the traditional sense, and required non-traditional outcomes, perhaps in the form of studies. It was also suggested that the form, whether draft articles or guidelines, should be determined in the early phases of work.

101. It was also suggested that the Commission adopt a more uniform approach in the preparation of commentaries, noting that the main purpose of a commentary should be to explain the meaning of a particular draft article or guideline and give the reasons for its content and wording.

102. Concerning future topics, it was noted that there was a need for the more careful selection of topics to better address the needs of the international community in the twenty-first century. "Hierarchy in international law" and the related issue of *jus cogens* were suggested for consideration by the Commission; so, too, was the subject of international environmental law, and it was noted in particular that the feasibility of considering the proposal on the law of the atmosphere, which was already before the Working Group on the long-term programme of work, merited discussion.

103. Some delegations welcomed the decision of the Commission to devote at least one meeting at its sixty-second session to a discussion of "settlement of disputes clauses", as well as the decision to place, on a pilot basis, the edited summary records of the work of the Commission up to 2004 on the Commission website, and they stressed the need to expedite the publication of the summary records.

104. Some delegations stressed the importance of and the need to enhance cooperation with other bodies, including with the newly established African Union Commission on International Law.

105. The Secretariat was commended for its work and its ongoing efforts to make documents of the Commission available to the general public on the website relating to the work of the Commission. The Secretariat was urged to make further efforts to make the website user-friendly. Voluntary contributions to the trust fund were encouraged with a view to addressing the backlog relating to the *Yearbook of the International Law Commission*. Some delegations acknowledged the usefulness of the International Law Seminar, since it offered a framework for young practitioners to familiarize themselves with the work of the Commission.

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Report of the International Law Commission on the work of its sixty-first session (2009)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, prepared by the Secretariat

Addendum

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A. Responsibility of international organizations

1. General comments

1. Delegations welcomed the adoption by the Commission of the draft articles on responsibility of international organizations and their commentaries on first reading and emphasized the importance and complexity of that text, particularly in view of the scarcity of practice and the development of new and diverse organizations. The importance of the adoption of a set of rules on the topic as an element of the rule of law at the international level was emphasized, and the method applied by the Commission, taking into account comments made on earlier versions of the draft, was welcomed. While support was expressed for most of the modifications thus brought to the text, some delegations noted the need for further elaboration of the commentaries.

2. Several delegations welcomed the general structure of the draft articles, although the difficulty of encapsulating all rules of responsibility of various international organizations in a single text was emphasized. In that regard, concern was expressed about the abstract character of some provisions, which did not sufficiently take into account the different powers and effects of decisions of organs of international organizations, and the influence of some members on them. It was noted that the Commission should refrain from attempting to reflect in the text various possible anticipated scenarios. It was further noted that the draft articles would prove less useful if unsupported by practice, as was the case for some provisions on aid, assistance and control or on circumstances precluding wrongfulness. The need to consider also the practice of organizations other than the United Nations and the European Union was mentioned in that respect.

3. The nature and extent of the relationship between the articles on State responsibility and the draft articles on responsibility of international organizations also attracted comments. For some delegations, the current draft articles managed to achieve a fair balance between the inspiration provided by the articles on State responsibility and the recognition of the specificities of international organizations. Other delegations, however, called for a more cautious approach and further study of the differences between States and international organizations. For some delegations, the parallels drawn between the articles on State responsibility and the draft articles on responsibility of international organizations had resulted in a degree of impracticability and the analogy between the two should not be extended beyond well-established rules; it would be better for the Commission to focus on specific issues arising from the responsibility of international organizations.

2. Comments on specific aspects of the draft articles

Part One — Introduction

4. While the new placement of the definitions in the text was welcomed, some suggestions were made as to the use of terms described in draft article 2. It was indicated that the definition of international organizations should be limited to intergovernmental organizations. The definition of the rules of the organizations met with support, although it was also deemed too broad and unclear, in particular with respect to the meaning of the reference to established practice amounting to a rule of the organization. Support was expressed, however, for the choice made by the Commission in not determining which of the rules of the organization constituted

international obligations. As far as the use of the term "agent" was concerned, it was suggested that the definition be based on the understanding of the term as rendered by the International Court of Justice.

Part Two, Chapter II — Attribution of conduct to an international organization

5. The view was expressed that some of the relevant draft articles required further consideration, particularly in respect of conduct of organs or agents placed at the disposal of an organization by a State or another organization. Reference was made to the relevance of the decision of the European Court of Human Rights in the *Behrami* and *Saramati* cases and of other decisions taken by the same tribunal and by domestic courts. In the light of that case law, the use by the Commission of the criterion of effective control or its reference to the performance of the functions of the agent were questioned, and the importance of the specificities of the chain of command and control on personnel put at the disposal of the United Nations in the context of peacekeeping operations was emphasized. Some delegations, however, expressly supported the stance adopted by the Commission.

Part Two, Chapter IV — Responsibility of an international organization in connection with the act of a State or another international organization

6. Various views were expressed regarding the responsibility incurred by international organizations as a result of decisions, authorizations and recommendations they address to their members. While some delegations called for the further elaboration of the notion of circumvention and clarification of the nature of the link between the authorization or recommendation of the organization and the act of its members, concern was expressed as to the suggestion that recommendations by an international organization may entail its responsibility. It was also indicated that States should be vigilant in not allowing an organization to be used for a national rather than a genuine collective interest.

Part Two, Chapter V — Circumstances precluding wrongfulness

7. For some delegations, the transposition to international organizations of circumstances precluding wrongfulness applying to States should be revisited, particularly the provisions concerning self-defence, distress or necessity.

8. Doubts were expressed in particular with regard to the reference to self-defence, which related primarily to States and could result in a conflict with the Charter of the United Nations. It was noted, however, that instances of self-defence could occur when an organization administered a State territory, and the wording of the corresponding provision, which did not rely on an analogy with the right of self-defence pertaining to States, also gained some support.

9. While some delegations continued to express concern regarding the introduction of the concept of countermeasures in the regime of responsibility of international organizations, the careful wording used by the Commission in draft article 21 was welcomed.

Part Three, Chapter II — Reparation for injury

10. From a general standpoint, it was indicated that the linking of the responsibility of international organizations and State responsibility with respect to

reparation for the commission of wrongful acts deserved deeper examination. Greater clarity was called for regarding the role of the organization and its members in the performance of the obligation of reparation of the organization. While some delegations considered that the Commission had struck a fair balance in that regard, as there was no legal ground for establishing the joint liability of members of an international organization when the organization failed to achieve full reparation others supported either an explicit rejection of the existence of a subsidiary obligation belonging to member States in such an occurrence or an indication of the limited role to be played by member States in that regard. It was also emphasized that the obligation to have members give the organization the means for providing reparation belonged to the organization concerned, and that the specific role of members in the decision-making process of the organization should also be considered in respect of reparation for injury.

Part Four, Chapter I — Invocation of the responsibility of an international organization

11. While it was suggested that the Commission study the possibility that the responsibility of an organization be invoked before international tribunals, it was also indicated that remedies provided by the responsible organization should include arbitral and national tribunals and administrative bodies. More broadly, it was emphasized that further elaboration of the invocation of the responsibility of an international organization and of the entitlement of members of the organization in that respect ought to be considered.

Part Four, Chapter II — Countermeasures

12. While some delegations welcomed the inclusion of provisions on countermeasures, the need for a detailed elaboration in that respect was also questioned. It was suggested that the Commission take a cautious approach and further study, in its second reading, the case of organizations deprived of dispute resolution mechanisms or failing to provide, in their constituent instruments, for the possibility for their members to take countermeasures against them. It was also emphasized in that regard that countermeasures should be distinguished from other measures, such as sanctions by the Security Council.

Part Five — Responsibility of a State in connection with the act of an international organization

13. Some delegations indicated that the provisions dealing with the responsibility of a State for the act of an organization lacked clarity, especially concerning the aid, assistance or control provided to the organization. A concern was expressed over situations in which member States were merely implementing a binding rule of an international organization, and the willingness of the Special Rapporteur to re-examine certain issues of attribution in the light of new jurisprudence and comments received was welcomed. Other delegations, while rejecting the responsibility of a State based on its mere membership of an organization, welcomed those provisions. It was also suggested that a distinction be drawn between cases in which an organization authorized its members to adopt a conduct and cases in which it orders them to do so.

14. While they generally welcomed the principle underlying the article dealing with the responsibility of a State seeking to avoid compliance with one of its obligations by taking advantage of the competence entrusted to an organization of which it is a member, some delegations questioned the breadth of that provision and sought further clarification of the causal link between the conduct of the State and that of the organization. While it was indicated that a general, if not a specific, level of intent, based on a factual and legal assessment, should be required in that regard, the view was also expressed that it would be difficult to provide evidence of specific intent on the part of a member to circumvent its obligations by using the competence of the organization.

Part Six — General provisions

15. Several delegations welcomed the inclusion of general provisions in the draft articles. The addition of a reference to the need to take account of the special characteristics of an international organization, which had been put forward during the debate in the Commission, received some support, although it was also pointed out that it could have the effect of putting the application of the draft articles in jeopardy.

16. Various views were expressed regarding the application of special rules (*lex specialis*). While several delegations supported the inclusion of a provision on the priority to be given to special rules, such as the rules of the organization, over general rules, others indicated that further consideration should be given to the issue so as to appreciate its actual scope. Some delegations indicated that the rules of an international organization should govern the relations between that organization and its members or, at least, play a key role in that regard. Others, however, warned against the risk that those internal rules might be used as a justification for breaches of international legal obligations and, more generally, that the reference to the *lex specialis* might be used to apply double standards to different organizations. The view was also expressed that the *lex specialis* should be limited to the internal law of the international organization concerned.

17. Regarding the "without prejudice" clause on individual responsibility, the view was expressed that a reference should be made to the civil and criminal responsibility of any person acting on behalf of an organization.

18. The need to include a provision such as draft article 66, according to which the draft articles are without prejudice to the Charter of the United Nations, was questioned by some delegations, especially given the fact that international organizations could not become parties to the Charter.

3. Issues concerning international responsibility between States and international organizations

19. Regarding the question as to when conduct of an organ of an organization placed at the disposal of a State would be attributable to the latter, several delegations noted the rarity of such an occurrence and emphasized the principle of attribution to the State by analogy with the articles on State responsibility. Others put forward various criteria for attribution to the State — notably, the criterion of effective control and the exercise of elements of governmental authority — while the need to respect the separate legal personalities of the organization and its members was emphasized, although it could prove necessary to pierce the veil of the

organization in specific cases of *ultra vires* conduct or conduct contravening a peremptory norm of international law. The view was expressed that the case of an organ of an organization acting under the direction and control of a State should also be considered.

20. Regarding the question as to when consent given by an organization would preclude the wrongfulness of an act committed by a State, while some delegations indicated that an application by analogy of the articles on State responsibility would be sufficient, others emphasized the complexity of the matter in all its ramifications (identity of the organ giving consent, origin and effect of the consent, etc.). It was indicated that a distinction should be drawn between rules protecting only the rights of the organization and those protecting the rights of other persons. In that context, some delegations also emphasized the relevance of the principle of *volenti non fit injuria* and of the general principle of *nemo plus juris ad alium transferre potest quam ipse habet*. The determinative role of the status of the State vis-à-vis the organization, and of the nature and competence of the latter, were also mentioned as relevant factors in that regard.

21. Regarding the circumstances under which an international organization may be entitled to invoke the responsibility of a State, several options were put forward. While some delegations indicated that mere regulation by analogy with the articles on State responsibility was sufficient, others expressed a preference for a specific treatment in the context of the draft articles on responsibility of international organizations. For several delegations, further study of the residual questions covered neither in the articles on State responsibility nor in the draft articles on responsibility of international organizations was necessary, leading to the separate adoption of a distinct article on the issue by the Commission, which would ultimately be endorsed by the General Assembly. While some delegations emphasized the determinative role of the status of the State vis-à-vis the organization, and of the nature and competence of the latter, others encouraged the Commission to further differentiate among various cases on the basis of the nature of the obligations concerned, whether they are owed to the organization itself or only to some of its members, or have an *erga omnes* character. It was also indicated in that context that an annex to the draft articles could address the potential concurrence between the exercise of diplomatic protection by a State and that of functional protection by an international organization.

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Shared natural resources: feasibility of future work on oil and gas

Paper prepared by Shinya Murase

I. Introduction

1. The International Law Commission, at its fifty-fourth session, in 2002, decided to include the topic "Shared natural resources" in its programme of work and appointed Chusei Yamada as Special Rapporteur on the issue.[1] A Working Group was established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.[2] The Special Rapporteur proposed to address transboundary groundwaters, oil and natural gas, taking a step-by-step approach, beginning with groundwaters.[3] At its sixtieth session, in 2008, the Commission adopted, on the second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers, with the recommendation that the General Assembly, inter alia, consider the elaboration of a convention on the basis of the draft articles.[4]

2. At the fifty-ninth session, in 2007, the Working Group on Shared Natural Resources, chaired by Enrique Candioti, discussed the issue of oil and gas resources on the basis of the fourth report (A/CN.4/580) submitted by the Special Rapporteur, Mr. Chusei Yamada. In addition to determining that the law of transboundary aquifers should be addressed separately from issues concerning oil and gas resources, the Commission decided to request the Secretariat to circulate to Governments a questionnaire on the subject prepared by the Working Group.[5] At the sixty-first session, in 2009, the Working Group discussed the feasibility of any future work by the Commission on the issue of oil and gas resources on the basis of

[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* and corrigendum (A/57/10 and Corr.1), paras. 518-519.
[2] Ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314.
[3] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 377.
[4] See General Assembly resolution 63/124.
[5] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 161-183.

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a working paper on oil and gas (A/CN.4/608), which had been prepared by Mr. Yamada before he resigned from the Commission. The Working Group decided to have the 2007 questionnaire recirculated and to entrust the author with the responsibility of preparing a study in which the feasibility of any future work by the Commission on oil and gas would be determined through the analysis of written replies from Governments and their comments and observations in the Sixth Committee of the General Assembly, as well as other relevant elements.[6] The present working paper is submitted in compliance with that request.

II. Replies and observations of Governments

3. The Commission received 39 replies from Governments, 19 of which addressed the question of the feasibility of future work by the Commission in the area of oil and gas.[7] In addition, a number of Government representatives made statements on the subject in the Sixth Committee.[8] From those written replies and oral statements, 46 in total, it is clear that the attitudes of Member States differ significantly on the issue of whether the Commission should undertake further work on oil and gas. While some States favour the Commission's embarking on such work, a majority of States expressed the view that the Commission should not. Several other States took a middle-of-the-road view, advising a cautious approach.

4. The first group of States expected the Commission to take up the question of oil and gas.[9] It was stated that there were similarities between groundwaters and oil and gas, not only from a legal point of view but also from a geological perspective, and that, even if a cautious approach was advisable, the same general legal principles seemed to apply in both cases. It was also stated that, even if there were certain differences between groundwater and oil and gas, that did not necessarily warrant a separate approach with regard to gaseous substances and liquid substances other than groundwater. According to this view, the fact that different rules applied to oil and gas did not necessarily require the formulation of a different legal framework for oil and gas, special rules for aquifers could be included in a common legal framework for shared natural resources, and the simultaneous consideration of the rules of international law related to all such resources would enhance the legal quality of the emerging international legal framework. A few other States expected the Commission to develop general rules on transboundary natural resources, whether aquifers or oil and gas, while cautiously recalling that such rules should not be considered in isolation from the issue of maritime boundary delimitation, which would require in-depth study and careful treatment, and that the subject was usually covered by bilateral agreements. Nevertheless, the States that favoured embarking on the question of oil and gas constituted a minority of the States that addressed the issue.

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[6] Ibid., *Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 187-193.

[7] A/CN.4/607; A/CN.4/607/Add.1. Replies were also received from three other Member States in January and February 2010.

[8] For comments and observations by delegations, see A/C.6/62/SR.22, 24 and 25, A/C.6/63/SR.16-18 and A/C.6/64/SR.17, 18 and 20-23.

[9] References to comments are made in the present working paper to demonstrate a general trend in the views of Member States and are not intended to be exhaustive.

5. The second group of States, which formed a clear majority, asserted that the topic of oil and gas should not be addressed by the Commission. The reasons cited by those States, while varying considerably, included the following points: (a) the question of oil and gas is essentially different from that of groundwater; (b) the issue is closely intertwined with the bilateral interests of the States involved; (c) it cannot be separated from boundary delimitation; (d) it is not suitable for codification; and (e) it involves political sensitivity and technical difficulty. Naturally, some of those reasons are closely interrelated, but they are referred to here for the sake of convenience, with a view to highlighting a general trend in the views of States.

A. Essential difference between aquifers and oil and gas

6. Several States expressed the view that groundwater should be addressed separately from oil and gas deposits, even if some geological factors might suggest the possibility of dealing with the two resources together. Such a limited, geological approach would ignore or underestimate social and economic implications, which differed significantly when it came to groundwater, on the one hand, and oil and gas, on the other. Similarly, the view was expressed that it was important to distinguish the physical or geological characteristics of oil and gas from the legal evaluation of those resources.

B. The question of bilateral nature

7. Many States considered that the question of oil and gas was one that involved the essential bilateral interests of the States concerned and that any attempt to codify general rules would not be appropriate or necessary. It was stated that the question was one to be resolved through negotiation between the States involved, as the topic was already adequately covered by principles of international law and dealt with by States on a bilateral basis. It was not deemed advisable to commence work on the subject of oil and gas, which were of great strategic, economic and developmental importance. Similarly, it was indicated that the specific and complex issues related to transboundary oil and gas reserves had been adequately addressed for a number of years through bilateral cooperation and mutually agreed arrangements, and thus did not seem to be giving rise to insurmountable problems in practice.

C. Boundary delimitation

8. Some States expressed the view that the Commission should not take up the subject of oil and gas because, in many cases, it would be linked to questions related to maritime delimitation. It was emphasized that the development, exploitation and management of transboundary oil and gas naturally presupposed the delimitation of territorial and/or maritime boundaries between two or more States and thus required a case-by-case approach. In particular, it was stressed that the Commission should refrain from considering matters relating to offshore boundary delimitation, as the 1982 Convention on the Law of the Sea undoubtedly stipulated that maritime delimitation was a matter to be addressed by the States concerned: in areas where States had yet to permanently resolve maritime claims, the questions of if and how

oil and gas resources were shared were inextricably linked to the resolution of such claims. Furthermore, the resulting delimitation agreements often contained provisions for the joint exploitation of oil and gas deposits straddling the agreed boundary. Such existing bilateral mechanisms represented the best way forward for States in the management of shared oil and gas reserves.

D. Doubts about suitability for codification

9. Doubts were expressed by several States with regard to the suitability of the topic for the codification exercise. Many States shared the view that the issue of oil and gas did not fall within the scope of international customary law and should be addressed through cooperation and negotiation between the States concerned, and that codification would be neither timely nor realistic. According to other States, the subject was not ripe for codification or was not suitable for codification by the Commission. Some States were not persuaded that further codification work by the Commission on this topic would have any added value, since it might lead to additional complexity and confusion. They considered that it would not be helpful or wise for the Commission to study this area further or to attempt to deduce certain rules of customary international law from the very limited relevant practice. It was also argued that the Commission had no mandate to consider the environmental aspects of fossil and hydrocarbon fuels in the context of the topic. It was further stated that scientific and legal studies had shown that it would be impossible to elaborate universal standards in that area, which had no aspects that could benefit from further elaboration in the context of the Commission's work. As the available relevant practice was bilateral in nature and context-specific, it was more appropriate for application in bilateral negotiations between interested States than for the process of the progressive development and codification of international law.

E. Political sensitivity and technical difficulty

10. It was noted by a number of States that the subject of oil and gas was a complex one that had given rise to considerable difficulties of a political or technical nature. It was also stressed that the Commission should take into account the complexity and sensitivity of the issue. It was stated that it would be advisable for the Commission to exercise caution with regard to this matter. States and industries had immense economic and political stakes in the allocation and regulation of oil and gas resources, and any proposal by the Commission would likely be highly controversial. It was also emphasized that the issue of transboundary oil and gas naturally involved highly technical data and politically sensitive issues, as well as the issue of State sovereignty.

11. In sum, a large number of States believed that the oil and gas issue was essentially bilateral in nature as well as highly political or technical, involving diverse regional situations. They expressed doubts as to the need for the Commission to proceed with any codification process relating to this issue, including the development of universal rules. Moreover, it appeared that those countries would be concerned if the Commission were to broaden the topic to include matters relating to offshore boundary delimitation.

12. The third group of States comprised those that did not clearly indicate their positions. Many States in this group stressed that the Commission must enjoy broad and widespread support among States if it wished to embark on the topic of oil and gas. Some States indicated that, while a codification exercise could not be considered appropriate or necessary, they would nonetheless welcome a study by the Commission on relevant State practice. For example, it was suggested that an analysis of various approaches taken under existing arrangements might lead to a set of common principles and best practices. It was also stated that the Commission might wish to consider conducting a survey on practice related to both inter-State and private contracts in order to shed light on general trends in practice, both in public and private law, which might lead to the proposal of guidelines if necessary.

III. Recommendation

13. It may be recalled that the topic "Shared natural resources" was included in the programme of work of the Commission on the basis of a syllabus prepared by Robert Rosenstock during its fifty-second session, in 2000, which sketched out the general orientation of the topic. It was stated in the syllabus that the Commission should focus "exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas".[10] There was no specific syllabus concerning the issue of oil and gas resources. It is for this reason that, following the completion of the work on transboundary aquifers, consideration of the feasibility of work on the topic of oil and gas has been warranted.

14. It is generally considered that, in selecting a new topic or sub-topic, the Commission should be guided by the following criteria, as elaborated by the Commission in 1997 and 1998: the topic should reflect the needs of States in respect of the progressive development and codification of international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and the topic is concrete and feasible for progressive development and codification.[11] Along the same lines, three feasibility tests were suggested for topic selection: the first was the practical consideration of whether there was any relevant pressing need in the international community as a whole; the second concerned the technical feasibility of the topic — whether it was sufficiently "ripe" in the light of relevant State practice and literature; and the third

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[10] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314. Differing views were expressed by Commission members as to whether or not a decision had been made by the Commission that oil and gas were included in the topic (see Ibid., *Sixty-second Session, Supplement No. 10* (A/62/10), paras. 169-170 and 177).

[11] See *Yearbook of the International Law Commission, 1997*, vol. II (Part Two), para. 238; Ibid., *1998*, vol. II (Part Two), para. 553. It may be recalled that the Commission further agreed that it should not restrict itself to traditional topics, but could also consider those reflecting new developments in international law and pressing concerns of the international community as a whole.

related to the political feasibility of the topic — whether addressing it might or might not meet with strong political resistance on the part of States.[12]

15. The views of the majority of Member States concerning the issue of oil and gas were largely negative, as summarized above. A majority believed that the question was not only essentially bilateral in nature, but also highly technical, involving diverse regional situations. It was particularly important to distinguish the physical or geological characteristics of oil and gas from the legal evaluation of those resources, and also to note that, as far as oil and natural gas were concerned, each case had its own specific and distinct features and would need to be addressed separately. Doubts were thus expressed as to the need for the Commission to proceed with any codification process relating to this issue, including the development of universal rules. It was feared that an attempt at generalization might inadvertently lead to additional complexity and confusion in an area that had been adequately addressed through bilateral efforts to manage it. Given that oil and gas reserves were often located in continental shelves, maritime boundary delimitation, which, in political terms, was a very delicate and sensitive issue for the States concerned, was a prerequisite for the consideration of this topic, unless the parties had mutually agreed, as in a limited number of cases, to bypass the problem of delimitation.[13]

16. With regard to the middle course of action suggested by a few States, namely, collecting and analysing information about State practice concerning oil and gas or elaborating a model agreement on the subject,[14] that might not be a very fruitful exercise for the Commission, precisely because of the specificities of each case involving oil and gas. The delicate and sensitive nature of certain relevant cases could well be expected to hamper any attempt at sufficiently extensive and useful analysis of the issues involved.

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[12] B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague, Martinus Nijhoff, 1977), pp. 60-63; Shinya Murase, *Kokusai Rippo* (International Lawmaking) (Toshindo, 2002) [Chinese translation forthcoming, to be published by Chinese People's Public Security University Press, 2010], pp. 217-221.

[13] See Jonathan Charney, et al., eds., *International Maritime Boundaries*, 4 vols. (Martinus Nijhoff, 1993-); Shinya Murase and Junichi Eto, eds., *International Law of Maritime Boundary Delimitation* (Toshindo, 2008) (in Japanese).

[14] A few attempts were made in the 1980s to elaborate model agreements. See Hazel Fox, et al., *Joint Development of Offshore Oil and Gas: Model Agreement for States for Joint Development with Explanatory Commentary* (1989); Hazel Fox, ed., *Joint Development of Offshore Oil and Gas*, vol. 2 (British Institute of International and Comparative Law, 1990); Alberto Szekely, et al., "Transboundary hydrocarbon resources: the Puerto Vallarta draft treaty", *Natural Resources Journal*, vol. 31, 1991, pp. 609f. (Joint project between a United States university and a Mexican university). It may be noted that the International Committee on the Exclusive Economic Zone stopped short of coming up with a model agreement. See "Joint development of non-living resources in the Exclusive Economic Zone", Report of the International Committee on the Exclusive Economic Zone, International Law Association, *Report of the Sixty-third Conference* (Warsaw), pp. 509-569.

17. Accordingly, the author of the present paper recommends that the Working Group decide, at the sixty-second session of the Commission, in 2010, that the topic of oil and gas will not be pursued any further.[15]

[15] Such a decision is not without precedent in the practice of the Commission. It may be recalled that the topic of the status, privileges and immunities of international organizations had been on the Commission's agenda since 1976 and that two successive Special Rapporteurs had submitted a total of eight reports on that issue. Neither in the Commission nor in the Sixth Committee had the view been expressed that the topic should be more actively considered. Hence, the Commission decided, on the basis of a recommendation of the Planning Group, that the topic should not be pursued, and that decision was endorsed by the General Assembly in 1992.